

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 **SUMMARY ORDER**

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6 **THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER**
7 **AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY**
8 **OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY**
9 **OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR**
10 **IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

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12 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
13 Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 11th
14 day of August, Two thousand and six.

15
16 PRESENT:

17 HON. BARRINGTON D. PARKER,
18 HON. RICHARD C. WESLEY,
19 HON. PETER W. HALL,

20
21 *Circuit Judges.*
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23
24 LAURENT KOULADOUMNGAR,

25 *Petitioner,*

26 -v.-

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28
29 UNITED STATES DEPARTMENT OF
30 HOMELAND SECURITY,

31 *Respondent.*
32
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35 **SUMMARY ORDER**
36 No. 05-3192-ag

37 For Plaintiff-Appellant: Laurent Kouladoumngar, *pro se*, Auburn, New York.

38 For Defendants-Appellees: Gail Y. Mitchell, Assistant United States Attorney, *for*
39 Kathleen M. Mehlretter, Acting United States Attorney for
40 the Western District of New York, Buffalo, New York.

41 **UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED,**
42 **ADJUDGED AND DECREED** the petition for review of a decision of a Board of Immigration

1 Appeals (“BIA”) is **GRANTED IN PART** and **DENIED IN PART**, the decision of the BIA is
2 **VACATED IN PART**, and the case is **REMANDED** for further proceedings consistent with
3 this order.
4

5 Laurent Kouladoumngar, *pro se*, petitions for review of the BIA decision summarily
6 affirming the decision of Immigration Judge (“IJ”) John B. Reid denying his application for
7 asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”). We
8 assume the parties’ familiarity with the underlying facts and procedural history of the case.

9 Where, as here, the BIA summarily affirms the decision of the IJ without issuing an
10 opinion, this Court reviews the IJ’s decision as the final agency determination. *See, e.g., Twum*
11 *v. INS*, 411 F.3d 54, 58 (2d Cir. 2005); *Yu Sheng Zhang v. U.S. DOJ*, 362 F.3d 155, 158 (2d Cir.
12 2004). This Court reviews the agency’s factual findings under the substantial evidence standard,
13 treating them as “conclusive unless any reasonable adjudicator would be compelled to conclude
14 to the contrary.” 8 U.S.C. § 1252(b)(4)(B); *see Zhou Yun Zhang v. U.S. INS*, 386 F.3d 66, 73 &
15 n.7 (2d Cir. 2004). This Court reviews *de novo* questions of law, mixed questions of law and
16 fact, and the application of law to undisputed fact. *See Hong Ying Gao v. Gonzales*, 440 F.3d 62,
17 65 (2d Cir. 2006).

18 Kouladoumngar, a native and citizen of Chad, initially came to the United States in
19 February 1998 on a student visa. In May 1999, he left the United States to seek asylum in
20 Canada. Canada ultimately denied his asylum application in April 2003, and returned
21 Kouladoumngar to the United States border, where he was placed in detention. Kouladoumngar
22 filed his United States asylum claim in July 2003. The IJ determined that Kouladoumngar filed
23 his United States asylum claim more than one year after his last arrival in the United States, and

1 that he failed to show extraordinary or changed circumstances that would permit a late filing.

2 See 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 1208.4(a)(2)(ii); see also 8 U.S.C. § 1158(a)(2)(D).

3 We recently held that the “proper interpretation of the one-year deadline provision of 8
4 U.S.C. § 1158(a)(2)(B) is a question of law over which we have jurisdiction.” *Joaquin-Porras v.*
5 *Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006); see also 8 U.S.C. § 1252(a)(2)(D); 8 U.S.C. §
6 1158(a)(3). However, under 8 U.S.C. § 1252(d)(1), we cannot consider either “bases for relief
7 that were not raised below” or “general issues that were not raised below,” but we can consider
8 “specific, subsidiary legal arguments, or arguments by extension, that were not made below.”
9 *Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005). Even liberally construing his *pro se* submissions to
10 the BIA, we cannot conclude that Kouladoumngar challenged the IJ’s ruling on the one-year time
11 bar for asylum applications. See *Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004). Thus, we must
12 deny Kouladoumngar’s petition to review the asylum ruling.

13 Kouladoumngar’s withholding of removal claim is not subject to the one-year filing
14 requirement for asylum. See 8 U.S.C. § 1158(a)(2)(B). In order to qualify for withholding of
15 removal, an applicant must show that it is more likely than not that his or her “life or freedom
16 would be threatened in that country because of the alien’s race, religion, nationality, membership
17 in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A). This is a higher
18 burden than that for asylum, but unlike asylum, if an applicant can make this showing, he or she
19 is entitled to withholding of removal. See *Li Zu Guan v. INS*, 453 F.3d 129, 135 (2d Cir. 2006);
20 *Zhou Yun Zhang*, 386 F.3d at 71; 8 U.S.C. § 1231(b)(3)(A). By demonstrating that he or she has
21 suffered past persecution, an applicant creates a rebuttable presumption that he or she has a

1 well-founded fear of future persecution. *See Mirzoyan v. Gonzales*, --- F.3d --- , 2006 WL
2 2068352, at *2 (2d Cir. July 20, 2006); *Tian-Yong Chen v. INS*, 359 F.3d 121, 126-27 (2d Cir.
3 2004).

4 Kouladoumngar claims that it is more likely than not that he will be persecuted if returned
5 to Chad because (1) he is a member of the “Sara” tribe, (2) he is a Christian, and (3) he was
6 politically active in a youth organization that supported a challenger to the head of the
7 Government of Chad. His withholding of removal claim is largely based on his alleged arrest,
8 mistreatment, beatings, and four day detention after organizing and participating in a protest
9 march in 1996 against the Chad government. The IJ assumed that Kouladoumngar’s testimony
10 regarding his detention was true, but nonetheless found that this was insufficient evidence of past
11 persecution because he did not make it “particularly clear as to exactly why [he] was detained.”
12 The IJ thought that Kouladoumngar would claim it was for all three reasons cited above
13 (membership in the Sara tribe, Christian religion, and political affiliation), and speculated that the
14 true reason for his detention may have been that the march itself was illegal under the laws of
15 Chad, thus rendering Kouladoumngar’s background irrelevant. In other words, the IJ believed
16 that Kouladoumngar failed to show a nexus between his persecution and a protected ground.

17 The IJ impermissibly held Kouladoumngar to too high a standard of proof to demonstrate
18 that the persecution he suffered was because of one particular ground. *See In re S-P-*, 21 I. & N.
19 Dec. 486, 489-90 (BIA 1996) (“[A]n applicant does not bear the unreasonable burden of
20 establishing the exact motivation of a persecutor where different reasons for actions are
21 possible.”) (internal quotation marks and citation omitted); *see also Osorio v. INS*, 18 F.3d 1017,

1 1027 (2d Cir. 1994) (“[I]t is immaterial whether the persecution arises from any single one of
2 these reasons or from a combination of two or more of them. . . . [I]t is not necessary for the
3 applicant to identify the correct ground; the fact finder should consider all or any combination of
4 them.”) (internal quotation marks, citations, and alterations omitted). Moreover, Kouladounngar
5 actually testified that he was being detained because of his political affiliation and support of an
6 opposition candidate. Thus, we find that the IJ’s rejection of Kouladounngar’s claim of past
7 persecution both was based on an erroneous view of the law, and was not supported by the
8 evidence.

9 However, the IJ also made factual findings regarding the likelihood that Kouladounngar
10 would suffer future persecution by the government of Chad, based on the experience of
11 Kouladounngar’s father and State Department Country Reports, and concluded that he would
12 not. The question, therefore, is whether we are confident that, absent the IJ’s erroneous findings
13 on Kouladounngar’s claim of past persecution, the “error-free proceeding would yield the same
14 result.” *Li Zu Guan*, 453 F.3d at 138. We do note that where, as here, the case turns on the
15 sufficiency of evidence presented (as opposed to Kouladounngar’s credibility), “a lower
16 quantum of evidence may justify a confident prediction with respect to a withholding of removal
17 claim as opposed to an asylum claim, given that the evidentiary burden on an applicant for
18 withholding is steeper.” *Id.* at 137 n.10 (citing *Li Hua Lin v. U.S. DOJ*, 453 F.3d 99, 107 n.6 (2d
19 Cir. 2006)). Nevertheless, we cannot make such a confident prediction in this case, and thus
20 grant the petition for review of the IJ’s withholding ruling.

21 Turning to Kouladounngar’s CAT claim, we conclude that because he did not present

1 any evidence that it was more likely than not he would be tortured upon return to Chad, as
2 defined by the relevant regulations, the IJ's denial of CAT relief was appropriate. *See Mu-Xing*
3 *Wang v. Ashcroft*, 320 F.3d 130, 134 (2d Cir. 2003); 8 C.F.R. § 208.18(a).

4 Finally, we turn to Kouladounngar's motions in this Court for withholding of removal
5 and CAT relief. Because it is for the agency to decide his eligibility for relief in the first
6 instance, these motions are denied. *See Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006); *INS*
7 *v. Ventura*, 537 U.S. 12, 18 (2002).

8 * * *

9 For the foregoing reasons, the petition for review is GRANTED in part with regard to the
10 withholding of removal claim and DENIED in part with regard to the asylum and CAT claims,
11 the BIA's order is VACATED in part, and the case REMANDED for proceedings consistent
12 with this order. The motions for withholding of removal and relief under CAT are DENIED.
13 Having completed our review, we VACATE the stay of removal that the Court previously
14 granted in this proceeding.

15 FOR THE COURT:
16 Roseann B. MacKechnie, Clerk
17

18 By: _____
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